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What's So Fair About the Fair and Accurate Credit Transactions Act?

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WHAT'S SO FAIR ABOUT THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT?

MICHAEL E. CHAPLIN*

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I. INTRODUCTION

Criticism may not be agreeable, but it is necessary; it fulfills the same function as pain in the human body, it calls attention to the development of an unhealthy state of things.

Winston Churchill¹

It has been said that “the Law is what the judges declare.”² If so, we are in desperate need of a second opinion. The Fair and Accurate Credit

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1. WILLIAM MANCHESTER, *THE LAST LION: WINSTON SPENCER CHURCHILL, VISIONS OF GLORY 1874–1932*, 348 (1983).

2. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 283 (Roland Gray ed., 2d ed., Macmillan Co. 1921).

Transactions Act³ (the “Statute”) has been the source of substantial, expensive, time-consuming litigation, stemming from a portion of the Statute regulating the amount of information a merchant may include on a consumer’s credit or debit card receipt.

Shortly after Congress enacted the Statute, the overwhelming voice of industry declared its understanding of the law: businesses may print up to the last five digits of a customer’s debit or credit card number, the card’s expiration date, or both.⁴ After the fact, most courts have declared: businesses may print the last five digits of the customer’s credit or debit card but not the expiration date.⁵

The disagreement has a certain ethereal quality to it. And while the debate may be interesting (not unlike determining the number of angels that can dance on the head of a pin), the consequences are costly.⁶ The decision not to allow merchants to print a credit or debit card’s expiration date has the potential to devastate scores of businesses and, as a consequence, wreak serious economic havoc, while at the same time filling the coffers of many attorneys.⁷ This, despite the fact that permitting the inclusion of the date causes no harm and has the salubrious benefit of saving many a company from financial ruin.⁸

While the civil process is important, and free and open access to the courts is central to the democratic economy,⁹ it is just as important to “balance between access to the courts and freedom from unjustifiable lawsuits.”¹⁰ One way we achieve this balance is by limiting access to those who have suffered a cognizable harm, that is, an actual injury. The Supreme Court has

3. Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. § 1681 (2006)).

4. See Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(3), 122 Stat. 1565, 1565 (finding that many businesses misinterpreted the original truncation requirements).

5. See, e.g., *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 970 (C.D. Cal. 2007).

6. See *infra* notes 27–29 and accompanying text.

7. See *infra* notes 27–29 and accompanying text.

8. See *infra* notes 27–29 and accompanying text.

9. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 84 (2005) (“Access to the courts is particularly important for minorities, the poor, lower socioeconomic classes, and other disenfranchised groups who must rely on the legal system for protection of basic human and civil rights.”); Wendy E. Parmet, *Quarantine Redux: Bioterrorism, AIDS and the Curtailment of Individual Liberty in the Name of Public Health*, 13 HEALTH MATRIX 85, 110 (2003) (describing access to the courts as the “indelible core of the rule of law”).

10. Timothy P. Getzoff, Comment, *Dazed and Confused in Colorado: The Relationship Among Malicious Prosecution, Abuse of Process, and the Noerr-Pennington Doctrine*, 67 U. COLO. L. REV. 675, 678 (1996).

specifically cautioned against “abandoning the requirement that the party seeking review must himself have suffered an injury.”¹¹ Without real harm, the aggrieved may not turn to the courts for relief.¹²

Where there is no harm, there should be no access; hence, the problem with the current spate of lawsuits. Or, more precisely, with that portion of the Statute that requires merchants to truncate certain information printed on their customer’s receipt (hereinafter, “FACTA”).¹³ Congress created the truncation requirement with the best of intentions, i.e., to protect unwarranted access to private financial information. The problem, however, is that the information being protected (primarily a credit or debit card’s expiration date) has little to do with protecting private financial records and little to do with the actual requirements of FACTA. It is, however, a source of seemingly endless litigation with minimal benefit to the litigants, but which provides plaintiffs’ attorneys with a potential windfall.¹⁴ This is especially so where, as here, the government has created litigation incentives by way of statutorily mandated damages (including minimum recoveries, attorney fees, and punitive damages), even where the plaintiff has not suffered any harm and cannot suffer actual harm.¹⁵

This does not mean that the Statute must be scrapped. The Statute provides several important tools in the battle against identity theft.¹⁶ But FACTA needs to be revised to protect merchants from unwarranted litigation.

11. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

12. While I am mindful that Congress may create statutory rights, the invasion of which creates the harm necessary to open the doors of the court, *Hedlund v. Hooters of Houston*, No. 2:08-CV-45, 2008 WL 2065852, at *2 (N.D. Tex. May 13, 2008), “the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants,” *Warth v. Seldin*, 422 U.S. 490, 501 (1975). For this reason, courts are rightly hesitant to grant relief for a mere technical violation of the law. *See, e.g., Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 520 (3d Cir. 2001) (affirming summary judgment, holding “there is no indication in either the text of the ADA or in its history that a technical violation of § 12112(d) was intended to give rise to damages liability”); *Mihalek Corp. v. Michigan*, No. 92-1641, 1993 WL 460787, at *3 (6th Cir. Nov. 9, 1993) (“In this case, even if there was a technical violation of 17 U.S.C. § 106, [Plaintiff] suffered no substantial harm, if any, from such violation. Therefore, [Plaintiff] is not entitled to a remedy for the alleged violation of his rights.”); *Schulist v. Blue Cross*, 717 F.2d 1127, 1133, 1134 (7th Cir. 1983) (noting a lack of injury “by these technical violations of the statute” and affirming “the action of the district court in dismissing all the ERISA claims”).

13. *See* Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, § 113, 117 Stat. 1952, 1959 (codified at 15 U.S.C. § 1681c(g)(1) (2006)).

14. Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REGULATION 50, 53 (1997).

15. *See* 15 U.S.C. §§ 1681n–1681o (2006).

16. Andrew Capalbo, *Developments in Banking Law: 2004*, 24 ANN. REV. BANKING & FIN. L. 1, 49–51 (2005) (describing various privacy protection tools, including: allowing “consumers to exclude most of their social security number from their credit file,” requiring “businesses to provide the transaction records to identity theft victims,” and requiring that “creditors abide by fraud-alert statements that consumers may put on their credit file, which means that a lender must contact the consumer before granting credit in their name”).

All laws are designed to serve various social policies, primarily to serve the public good by protecting individuals from actual harm. Attorney compensation has not, however, topped the list of justifications sufficient for a particular statutory scheme. Yet, that appears to be the primary outcome of FACTA.

To better understand the statutory purpose and context, this Article begins with a brief introduction to FACTA's structure and then explores several of the more pressing problems flowing from what has become a tidal wave of FACTA litigation. In particular, it will examine the following: problems raised by a recent attempted legislative fix, interpretive challenges surrounding FACTA's truncation requirements, due process concerns raised by FACTA's compensatory scheme, and significant procedural issues flowing from the structure of the lawsuits (i.e., problems with the lawsuits as putative class actions). It then concludes by examining potential solutions to some of the thornier problems raised by FACTA's implementation.

II. THE FACTA FACTS

Get your facts first, and then you can distort them as much as you please.

Mark Twain¹⁷

The Statute, which amends the Fair Credit Reporting Act ("FCRA"), was enacted into law in 2003 but did not become fully effective until December 2006.¹⁸ Chief among its stated purposes is the prevention of "identity theft."¹⁹ To that end, FACTA requires businesses to limit the amount of information printed on credit and debit card receipts:

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card

17. Jeffrey A. Peck & Jodi Sydel Rosenzweig, *Closing Argument*, 194 N.J. LAWYER, Dec. 1998, at 39.

18. Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. § 1681 (2006)); FED. TRADE COMM'N, SLIP SHOWING? FEDERAL LAW REQUIRES ALL BUSINESSES TO TRUNCATE CREDIT CARD INFORMATION ON RECEIPTS (2007), available at <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt007.pdf> (explaining the December 2006 effective date) (last visited Jan. 17, 2009).

19. Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. § 1681 (2006)); FED. TRADE COMM'N, *supra* note 18.

number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.²⁰

This one sentence has spawned hundreds of lawsuits against numerous retail businesses by consumers seeking to enforce FACTA's truncation requirement.²¹ The FCRA permits lawsuits for either negligent or willful violations of FACTA. Plaintiffs who are successful in proving a negligent violation may recover actual damages, costs of the suit, and reasonable attorney fees.²² Plaintiffs who are successful in proving a willful violation may recover actual damages or statutory damages of not less than \$100 and not more than \$1000, costs of litigation together with attorney fees, and punitive damages.²³

Not surprisingly, most, if not all, of the pending lawsuits allege that defendants willfully violated FACTA and, as a general rule, claim statutory damages only.²⁴ The lion's share of the FACTA lawsuits have been filed as putative class actions, which means that the litigant seeks relief on behalf of a class of individuals that received receipts that contained more information than FACTA permits.²⁵ Significantly, the FCRA, and therefore FACTA, does not cap the total damages recoverable in a consumer class action lawsuit.²⁶ This is important because, calculated on a per violation basis, total damages can be devastating.²⁷ One court, for example, estimated that for a potential class of 2.9 million people "statutory damages alone would range from a minimum of \$290 million to a maximum of \$2.9 billion."²⁸ Such damages are typically greater than the merchant's net worth.²⁹

Until recently, most of these lawsuits were filed in the federal district courts in the state of California. The reason was simple enough. The Ninth

20. 15 U.S.C. § 1681c(g)(1) (2006); *see also* *Iosello v. Leiblys, Inc.*, 502 F. Supp. 2d 782, 786 (N.D. Ill. 2007) ("Congress enacted FACTA with the intent of helping to prevent the possibility of thieves stealing the identity of another by obtaining one's credit card number and the expiration date of that credit card.").

21. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(4), 122 Stat. 1565, 1565 ("Almost immediately after the deadline for compliance passed, hundreds of lawsuits were filed alleging that the failure to remove the expiration date was a willful violation of the Fair Credit Reporting Act even where the account number was properly truncated.").

22. 15 U.S.C. § 1681o (2006).

23. 15 U.S.C. § 1681n (2006).

24. *See, e.g., Iosello*, 502 F. Supp. 2d at 783.

25. *See, e.g., Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 967 (C.D. Cal. 2007).

26. *See* 15 U.S.C. § 1681n(a) (2006).

27. *See, e.g., Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW, 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007).

28. *Id.* (emphasis omitted).

29. *See, e.g., id.* ("\$290 million represents more than 600% of Defendant's net worth.").

Circuit defined “willful” to include not only knowing acts, but also reckless ones.³⁰ On June 4, 2007, the United States Supreme Court ruled that “willful” included both intentional and reckless acts.³¹ Given this more relaxed standard, combined with the large potential damage awards, FACTA has become a growing source of supply for the lawsuit industry.³² The question, therefore, is whether these lawsuits should be allowed to continue. This Article suggests they should not. It offends fundamental notions of fairness when litigants, without actual injury (and without the prospect of actual injury), are allowed to use the courts as a means of financial gain. It is within the court’s power to stop the litigation at an early stage. However, if the courts refuse to stem the litigation tide, Congress should act—now.

III. CONGRESS’S ATTEMPTED FIX

The mistakes made by Congress wouldn’t be so bad if the next Congress didn’t keep trying to correct them.

Cullen Hightower³³

On June 3, 2008, President Bush signed into law the Credit and Debit Card Receipt Clarification Act of 2007.³⁴ The Clarification Act is a limited attempt to restrict merchant liability related to FACTA’s truncation requirement.³⁵ The new law provides, in relevant part:

(a) In General.—Section 616 of the Fair Credit Reporting Act (15 U.S.C. § 1681n) is amended by adding at the end the following new subsection:

(d) Clarification of Willful Noncompliance.—For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and the date of the enactment of this subsection but otherwise complied with the requirements of section 605(g) [15 U.S.C. § 1681c(g)] for such receipt shall not be in willful noncompliance with section 605(g) by reason of printing such expiration date on the receipt.

30. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

31. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2208 (2007).

32. *See infra* note 52 and accompanying text.

33. THE QUOTABLE POLITICIAN 141 (William B. Whitman ed., 2003).

34. Pub. L. No. 110-241, 122 Stat 1565 (codified as amended in scattered sections of 15 U.S.C.).

35. *Id.*

- (b) *Scope of Application.*—The amendment made by subsection (a) shall apply to any action, other than an action which has become final, that is brought for a violation of 605(g) of the Fair Credit Reporting Act to which such amendment applies without regard to whether such action is brought before or after the date of the enactment of this Act.³⁶

Unfortunately, the Clarification Act is flawed in several important ways. First, the law provides a narrowly tailored remedy that applies retrospectively only, and for a limited period of time.³⁷ It limits liability for “willful noncompliance” for the time period from December 4, 2004, to June 3, 2008 (the date the Clarification Act was signed into law).³⁸ In effect, the Clarification Act gives merchants one free bite at the apple. That is, the law appears to say: “Okay, you were wrong, but we won’t count it against you—just don’t do it again.” Respectfully, this is a less than satisfying response. If it is unlawful to print a card’s expiration date, we must wonder why—why allow merchants to abuse their customers for a limited period of time? On the other hand, if as the law suggests, “proper truncation of the card number, by itself as required by the amendment made by [FACTA], regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud”³⁹ then why limit the time to which the Clarification Act applies? It would have been better had Congress simply solved the problem by amending FACTA to eliminate any cause of action based on inclusion of the card’s expiration date.

Second, while the law will likely limit (or eliminate) certain of the pending FACTA actions, it also heightens the danger that any future violations will be construed as willful due to the publicity surrounding the current FACTA lawsuits as well as passage of this law.⁴⁰ This last point received some attention before the bill became law.⁴¹ In late 2007, in response to a merchant’s motion to dismiss a FACTA lawsuit based, in part, on the Clarification Act, District Judge Virginia M. Kendall presciently observed:

36. *Id.* § 3

37. *See id.* § 3(a).

38. *Id.*

39. *Id.* § 2(a)(6).

40. *See id.* §§ 2–3.

41. *See* NAT’L SMALL BUSINESS ASS’N, CREDIT AND DEBIT CARD RECEIPTS COULD LEAD TO COURT (2007), <http://www.nsba.biz/content/printer.1578.shtml> (last visited Jan. 17, 2009).

While the Bill does suggest that some merchants may have misunderstood the truncation requirement in § 1681c(g), the Bill would *not* amend that section. Instead, the bill proposes the addition of a new subsection to § 1681n [regarding damages], which proposed subsection provides that:

For the purposes of this section, *any person who printed an expiration date on any receipt* provided to a consumer cardholder at a point of sale or transaction between December 4, 2004 and the date of the enactment of this subsection *but otherwise complied* with the requirements of section 605(g) [1681c(g)] for such receipt shall not be in willful noncompliance with section 605(g) by reason of printing such expiration date on the receipt. (emphasis added).

Even if the Court were to consider the Bill in reaching its decision in this case, it would only bolster this Court's conclusion that printing an expiration date on any receipt provided to a consumer cardholder constitutes a violation of § 1681c(g).⁴²

While possibly assisting certain merchants with some of the pending FACTA lawsuits, the new law fails to resolve and, going forward, may heighten the risks associated with FACTA enforcement. Finally, Congress did nothing to address the bigger problem of total recoverable damages. It simply makes no sense not to cap total damages, especially where courts have, in other contexts, found that the failure to include a statutory cap is fatal.⁴³ Thus, the problems with FACTA may be with us for some time to come.

42. Follman v. Village Squire, Inc., 542 F. Supp. 2d 816, 821 n.3 (N.D. Ill. 2007) (bold emphasis added).

43. See, e.g., *In re Trans Union Corp.*, 211 F.R.D. 328, 349 (N.D. Ill. 2002). The *Trans Union* court stated:

Recently, [Federal District Courts in] both the Western District of Missouri and the Eastern District of New York have relied on the reasoning of *Ratner* and its progeny to reject class actions under the Cable Communications Act of 1984 ("Cable Act"), 47 U.S.C. § 551(f) which, like the FCRA and pre-amendment [Truth In Lending Act], provides for actual damages but not less than minimal statutory recovery, with no cap on class action damages.

Id. (citing *Parker v. Time Warner Entm't Co.*, 198 F.R.D. 374, 381 (E.D.N.Y. 2001); *Wilson v. Am. Cablevision of Kansas City, Inc.*, 133 F.R.D. 573 (W.D. Mo. 1990)).

IV. NO HARM NO FOUL

Who wants a nation of law-abiding citizens? What's there in that for anyone? But just pass the kind of laws that can neither be observed nor enforced nor objectively interpreted—and you create a nation of law-breakers—and then you cash in on guilt.

Ayn Rand⁴⁴

Congress enacted FACTA to reduce the incidents of consumer identity theft.⁴⁵ Insofar as FACTA accomplishes this goal, it furthers the good of society.⁴⁶ For example, a person who has been the victim of identity theft should be allowed to pursue all civil remedies. So too, a person who has suffered a statutory injury (i.e., a person has not been defrauded, but the statutory violation exposes the person to a threat of real harm) should be allowed to prove his or her case. However, FACTA goes much further than merely preventing harm or punishing either the fraudster or those who enable the fraudulent act. Instead, FACTA improperly provides a mechanism for punishing a merchant where there has been no harm: no identity theft and no real possibility of identity theft.⁴⁷

FACTA requires merchants to remove from the consumer receipt all but the last five digits of the credit or debit card number and, potentially, the card's expiration date.⁴⁸ While there is some debate whether the Statute requires merchants to remove the card's expiration date when the receipt has otherwise been properly truncated,⁴⁹ it is widely understood that leaving the expiration date on the otherwise truncated receipt does not increase the risk of identity theft.⁵⁰ “Experts in the field agree that proper truncation of the card number, by itself as required by [FACTA], regardless of the inclusion of the

44. AYN RAND, ATLAS SHRUGGED 436 (1957).

45. Lawrence A. Young & Patrick McCarren, *Just the FACT(s), Ma'am—A Roadmap to the FACT Act*, 59 CONSUMER FIN. L.Q. REP. 239, 240 (2005) (“One of the major goals of the FACT Act was to address this problem, to implement procedures to reduce identity theft and fraud, and as possible to prevent them from happening altogether.”).

46. *See id.*

47. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (“The principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree.”).

48. Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, § 113, 117 Stat. 1952, 1959 (codified at 15 U.S.C. § 1681c (2006)).

49. *See cases cited infra* note 52.

50. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241 § 2(a)(6), 122 Stat 1565, 1565.

expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud.”⁵¹

This Article takes no exception to those lawsuits in which plaintiffs’ claims are based on receipts that include both the card’s expiration date and more than the card’s last five digits. However, for the many suits arising out of a technical violation of the law (i.e., the card numbers are properly truncated, but the receipt included the card’s expiration date),⁵² relief should be denied.

51. *Id.*; see also *Seig v. Yard House Rancho Cucamonga, L.L.C.*, No. CV 07-2105 PA, 2007 U.S. Dist. LEXIS 97209, at *16 (C.D. Cal. Dec. 10, 2007) (“[I]t appears unlikely, if not impossible, for the inclusion of the expiration date on a debit card receipt to result in identity theft or any other actual harm.”); *Medrano v. Modern Parking, Inc.*, No. CV 07-2949 PA, 2007 U.S. Dist. LEXIS 82024, at *17 (C.D. Cal. Sept. 17, 2007) (same); *Evans v. U-Haul Co. of Cal.*, No. CV 07-2097 JFW, 2007 U.S. Dist. LEXIS 82026, at *17 (C.D. Cal. Aug. 14, 2007) (same); *Soualian v. Int’l Coffee & Tea L.L.C.*, No. CV 07-502 RGK, 2007 U.S. Dist. LEXIS 44208, at *10 (C.D. Cal. June 11, 2007) (“[I]t appears virtually impossible for the inclusion of the expiration date on a credit card or debit card receipt to result in identity theft or any other actual harm.”); *Spikings v. Cost Plus, Inc.*, No. CV 06-8125 JFW, 2007 U.S. Dist. LEXIS 44214, at *13 (C.D. Cal. May 25, 2007) (“[I]t appears unlikely, if not impossible, for the inclusion of the expiration date on a credit card or debit card receipt to result in identity theft or any other actual harm.”). But see *Ramirez v. Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1163–64 (D. Kan. 2008) (“The primary purpose of the expiration date on a Visa card is fraud detection and prevention.”); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (denying defendant’s motion to dismiss based on failure to eliminate the expiration date, holding that although plaintiff’s loss was “small and hard to quantify,” plaintiffs properly alleged “actual harm” in the form of an “increased risk of identity theft”).

52. See, e.g., *Ramirez*, 537 F. Supp. 2d at 1163 (“It is undisputed that the receipt she was given contained the last four digits of her credit card number as well as her card’s expiration date.”); *Follman v. Village Squire, Inc.*, 542 F. Supp. 2d 816, 819 (N.D. Ill. 2007) (“Follman alleges that VSI [violated § 1681c(g)] when it provided him with a receipt that included his card’s expiration date.”); *Gueorguiev v. Max Rave, L.L.C.*, 526 F. Supp. 2d 853, 856 (N.D. Ill. 2007) (“Plaintiff . . . alleges Max Rave violated . . . FACTA . . . when it printed a cash register receipt which displayed plaintiff’s card expiration date.”); *Halperin v. Interpark, Inc.*, No. 07CV2161, 2007 U.S. Dist. LEXIS 87851, at *2 (N.D. Ill. Nov. 29, 2007) (“The receipt contained the last four digits of his card number and the card’s expiration date.”); *Hile v. Frederick’s of Hollywood Stores, Inc.*, No. 07-0715 SC, 2007 U.S. Dist. LEXIS 81105, at * 2 (N.D. Cal. Oct. 17, 2007) (Plaintiff alleges that he “was provided a receipt that contained the expiration date of Plaintiff’s credit card.”); *Follman v. Hospitality Plus of Carpentersville, Inc.*, 532 F. Supp. 2d 960, 962 (N.D. Ill. 2007) (“On or about April 24, 2007, and May 8, 2007, plaintiff received a computer-generated receipt from Culver’s which displayed plaintiff’s card expiration date.”); *Reynoso v. S. County Concepts*, No. SACV 07-373 JVS, 2007 WL 4592119, at *1 (C.D. Cal. Oct. 15, 2007) (“Reynoso alleges that on March 21, 2007 he received from TAPS a receipt for his credit or debit card purchase that included the expiration date of the card in violation of [FACTA].”); *Harris v. Wal-Mart Stores, Inc.*, 07CV2561, 2007 U.S. Dist. LEXIS 76012, at *1 (N.D. Ill. Oct. 10, 2007) (“The computer-generated receipt for the transaction that Harris received from Wal-Mart displayed the expiration date for his credit card.”); *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 757–58 (E.D. Pa. 2007) (“She alleges Defendant provided her with a receipt that contained 4 digits from her credit card account number and also contained her credit card’s expiration date.”); *Iosello v. Leiblys, Inc.*, 502 F. Supp. 2d 782, 783 (N.D. Ill. 2007) (“According to Iosello, he made a purchase from Leiblys using his credit card on or about January 21, 2007, and the receipt for the transaction contained the expiration date of Iosello’s

The policy reasons are simple enough. Courts are loath to impose crushing liability for technical violations of a statutory scheme.⁵³ A long recognized judicial principle provides that “where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable” the penalty violates due process and is, therefore, without effect.⁵⁴ A corollary to this principle provides “that a statutory damages provision that grossly exceeds any actual damages would violate due process as ‘an irrational and arbitrary deprivation of the property of the defendant.’”⁵⁵ Actual damages based on including the debit or credit card’s expiration on the customer receipt (again, assuming that the card has otherwise been properly truncated) appear to be zero. Where there is no harm, there can be no proportionality to the award and, therefore, any award would be unreasonable and arbitrary. “While a plaintiff is allowed to opt for statutory damages in lieu of actual damages, this option is not intended to provide the plaintiff with a windfall recovery.”⁵⁶

credit card.”); *Najarian v. Charlotte Russe, Inc.*, No. 07-501, 2007 U.S. Dist. LEXIS 59879, at *3 (C.D. Cal. June 12, 2007) (“Defendant printed the expiration date of Plaintiff’s credit card on a receipt provided to Plaintiff”); *Najarian v. Avis Rent A Car System*, No. 07-588 RGK, 2007 U.S. Dist. LEXIS 59932, at *3 (C.D. Cal. June 11, 2007) (“Some Check Out Rental Agreements issued by Defendants between December 4, 2006 and January 26, 2007 (the Class Period) contained Prohibited Information (the expiration date of the customer’s credit or debit card).”); *Lopez v. Gymboree Corp.*, No. C 07-0087 SI, 2007 U.S. Dist. LEXIS 44461, at *4 (N.D. Cal. June 9, 2007) (“Plaintiff alleges that Gymboree violated . . . FACTA when . . . Gymboree printed the expiration date of plaintiff’s credit card on a receipt provided to plaintiff.”); *Arcilla*, 488 F. Supp. 2d at 967 (“Plaintiff Eugelio Arcilla claims that . . . Adidas printed him a receipt containing information that FACTA prohibited—namely, the expiration date of his credit card.”).

53. See, e.g., *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 776 (3d Cir. 1974). The *Katz* court reasoned:

[T]he recovery in this action might run as high as \$80,000,000, even if only minimum damages were sought by each plaintiff. Such a liability could conceivably bankrupt the defendant, and force it to cease operation. This prospect of a “horrendous, possibly annihilating punishment” for a technical violation of the Act is certainly a relevant consideration in any inquiry into the “superiority” of a class action as a means of enforcing the statute.

Id.; *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (“[T]he proposed recovery of \$100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act.”). But see *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (“[I]t lies in the legislative decision to authorize awards as high as \$1,000 per person.”).

54. *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 26 (2d Cir. 2003); see also *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992).

55. *DirecTV, Inc. v. Spillman*, No. Civ.A.SA-04-82-XR, 2004 WL 1875045, at *4 (W.D. Tex. Aug. 23, 2004) (quoting *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003)).

56. *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769 (S.D.N.Y. 1988) (discussing violations of the Copyright Act).

As Judge Newman of the U.S. Court of Appeals for the Second Circuit recently observed, “[e]ven if a massive aggregation of minimum statutory damages survives constitutional scrutiny, there is a substantial question whether the Congress that authorized payments of \$1,000 for [violations of the statute] expected 12 million of them each to receive such an amount for a somewhat technical violation.”⁵⁷ While the court was discussing the Cable Communications Policy Act (“CCPA”), its reasoning applies with equal force to technical violations of FACTA. The CCPA is similar to FACTA in that it provides for actual damages (with a minimum statutory damage award of \$100 to \$1000), punitive damages, and attorney fees.⁵⁸ Both are consumer protection statutes. There is little to be protected where actual damages approach zero and little to be gained by imposing crushing, company-destroying damage awards.

V. IT MEANS WHAT?

Law . . . must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.

Roscoe Pound⁵⁹

FACTA presents certain interpretive difficulties, chief of which is whether the Statute requires or merely permits the merchant to eliminate the expiration date from an otherwise properly truncated receipt. If the Statute requires merchants to eliminate the expiration date, then we are left with an unfortunate anomaly—that is, a statutory scheme at odds with a near universal business interpretation. While not inconceivable from an interpretive standpoint, this reading would expose merchants to potentially disastrous liability.

FACTA’s remedies also raise serious due process concerns. The Statute provides for statutory damages from a minimum of \$100 per violation to a maximum of \$1000 per violation.⁶⁰ The trouble with this sliding scale is that

57. *Parker*, 331 F.3d at 26 (Newman, J., concurring) (discussing the Cable Communications Policy Act).

58. 47 U.S.C. § 551(f)(2) (2006). While the statute provides for a range of damages, they are limited to actual damages with a statutory floor of \$100 per day or \$1000, whichever is higher. *Id.* This is an important distinction because, as discussed more fully in the void-for-vagueness section, FACTA provides for damages where there has been no harm and provides a sliding scale of relief on a per transaction basis of \$100 minimum to \$1000 maximum. 15 U.S.C. § 1681n(a) (2006).

59. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

60. 15 U.S.C. § 1681n(a)(1)(A) (2006).

jurors have no guidelines—no way of determining (apart from guessing) the amount of the award. It cannot be based on pure conjecture; otherwise the award is speculative and void.⁶¹ Neither can it be based on culpability; otherwise it becomes nothing more than a secondary source of punitive damages.

A correlative point is whether, assuming FACTA does not allow a merchant to include the expiration date on the consumer receipt, the merchant's interpretation is "objectively unreasonable" or "merely careless."⁶² If it is objectively unreasonable, the violation is more likely willful. If, however, it is merely careless or a reasonable business interpretation, the violation, if any, will more likely be negligent. The willfulness-negligence distinction is important primarily as it relates to damages.⁶³ In a negligence context, plaintiffs are not entitled to statutory damages (the only type of damage that appears to be at issue in the current spate of lawsuits).⁶⁴

At the heart of this discussion is the critical issue of statutory interpretation, or more precisely, whether FACTA is too vague to enforce. A statute may be overly vague in one, or both, of two interrelated senses. First, a statute may be so vague that no reasonable interpretation is possible.⁶⁵ This level of vagueness offends constitutional sensibilities, and the statute is, therefore, void.⁶⁶ Second, a statute may be enforceable, but it is open to competing reasonable interpretations,⁶⁷ in which case the question is: "whose interpretation controls?"

A. *Is FACTA too Vague to Enforce?*

Hence debates in that great body often become vague and tortuous and seem to drag their feet rather than march straight for their stated goal. Something analogous to this will, I

61. See *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 414 (5th Cir. 2007) ("Further, even if this court could otherwise uphold the verdict for fraud and conspiracy to commit fraud, the damages award was based on conjecture and speculation as to what amount the defendants obtained through A&I's fraud, and therefore it, too, cannot be sustained."); *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992) ("In order to recover damages, a claimant must present evidence that provides the finder of fact with a reasonable basis upon which to calculate the amount of damages. He need not prove the amount of loss with mathematical precision; but the jury is not allowed to base its award on speculation or guesswork."); *Combined Network, Inc. v. Equitable Life Assurance Soc'y of the U.S.*, 805 F.2d 1292, 1299 (7th Cir. 1986) ("[A] trier of fact may not award damages on the basis of conjecture or guesswork.").

62. See *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007).

63. Compare 15 U.S.C. § 1681n (2006) (willful violations) with 15 U.S.C. § 1681o (2006) (negligent violations).

64. § 1681o.

65. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

66. *Id.*

67. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989).

think, always take place in the public assemblies of democracies.

Alexis de Tocqueville⁶⁸

The Constitution establishes drafting boundaries for all federal statutory schemes.⁶⁹ If the statute fails to meet constitutional standards, it is void.⁷⁰ “The void-for-vagueness doctrine reflects the principle that ‘a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.’”⁷¹ Simply put, the statute must be understandable by the average, reasonably intelligent person.

As it pertains to FACTA, there are two dimensions to the void-for-vagueness argument. The first is whether FACTA’s truncation requirements are clear, that is, whether reasonably intelligent business people are able to discern the basic requirements of FACTA such that they can apply its restrictions and prohibitions without having to speculate as to what they are. The second is whether courts can fairly apply FACTA’s statutory damage scheme. Here, the question is whether the Statute provides a reasonable fact-finder (typically a jury) adequate guidelines for fairly meting out damage awards, or whether the fact-finder is left to its own devices to guess at the appropriate award. As to the first, courts have generally concluded that FACTA is clear and unambiguous,⁷² though it is far from clear that *their* reasoning is clear and unambiguous. As to the second, there is limited case law on point, but what is available tends to demonstrate a real constitutional problem with the statutory scheme.

The first issue thus becomes whether the Statute “provide[s] people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.”⁷³ The second issue is whether the statutory scheme “authorizes or even encourages arbitrary and discriminatory enforcement.”⁷⁴

68. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 577 (Arthur Goldhammer trans., Literary Classics of the U.S., Inc. 2004).

69. See *Hill v. Colorado*, 530 U.S. 703, 731–32 (2000).

70. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984).

71. *Id.* (quoting *Connally*, 269 U.S. at 391).

72. See *infra* note 95 and accompanying text.

73. *Hill*, 530 U.S. at 732; see also *Arcilla v. Adidas Promotional Operations, Inc.*, 488 F. Supp. 2d 965, 970 (C.D. Cal. 2007) (“Thus, the question here is essentially whether § 1681c(g) is sufficiently clear that its prohibitions would be understood by an ordinary person operating a profit-driven business.”).

74. *Hill*, 530 U.S. at 732.

1. FACTA's Truncation Requirement

Most of the research which is done is determined by the requirement that it shall, in a fairly obvious and predictable way, reinforce the approved or fashionable theories.

Celia Green⁷⁵

Typically, courts find that the wording of the truncation requirement leaves little room for debate, generally relying on the Supreme Court's instruction that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action."⁷⁶ In holding that the truncation requirement is clear, however, the courts place undue emphasis on the somewhat relaxed "economic regulation" standard but fail to give any real weight to the express limitations, i.e., whether the legislation is sufficiently narrow such that reasonably prudent business people can understand its meaning, given their ability to consult appropriate authority in advance of pertinent business decisions.⁷⁷

Congress designed FACTA to aid in the prevention of "identity theft."⁷⁸ Identity theft is defined to mean "a fraud committed using the identifying information of another person"⁷⁹ Most FACTA lawsuits are based on allegations that the named defendant(s) failed to remove the expiration date from the offending receipt.⁸⁰ Thus, the question here is whether "an ordinary person operating a profit-driven business" would understand that the Statute required the removal of the expiration date in order to effectuate the Statute's goal of preventing identity theft.⁸¹

While FACTA is facially narrow (at least concerning information that may be printed on a credit card receipt), it appears as though merchants had little or no opportunity to "consult relevant legislation in advance of action."⁸²

75. Interview by Jayne Gackenbach with Celia Green, author of *Lucid Dreams* (1991), available at http://sawka.com/spiritwatch/interview_with_celia_green.htm (last visited Jan. 17, 2009).

76. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (footnote omitted).

77. See *id.*

78. See generally Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 ("An Act to amend the Fair Credit Reporting Act, to prevent identity theft") (codified at 15 U.S.C. § 1681a (2006)).

79. § 111, 117 Stat. at 1954.

80. See cases cited *supra* note 52.

81. *Iosello v. Leiblys, Inc.*, 502 F. Supp. 2d 782, 785 (N.D. Ill. 2007).

82. See *Hoffman Estates*, 455 U.S. at 498.

Other than the FACTA text, there is no indication that the business community was able to access other relevant legislation to clarify or explain FACTA's truncation requirements. There is also significant evidence tending to show that merchants, while truncating debit and credit card numbers, reasonably believed the Statute did not require the removal of the expiration date.⁸³

This reasonable belief is all that is necessary⁸⁴ and should have forced the courts to tip the scales in the merchant's favor. The Supreme Court, in an analogous case regarding the application of the FCRA, concluded that the plaintiff was not entitled to damages under 15 U.S.C. § 1681n(a) for a willful violation of the FCRA, making the following important points: first, "[t]his is not a case in which the business subject to the Act had the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned it away from the view it took."⁸⁵ Second, even though the defendant's reading of the statute was "erroneous," it was not "objectively unreasonable" in large part due to the "dearth of guidance and the less-than pellucid statutory text."⁸⁶ So too, the merchants in the FACTA cases had no guidance from the courts of appeals or the FTC, and the statutory text (as explained in more detail below) is less than clear as to the truncation requirements.⁸⁷ Such vagaries should not become the foundation on which we base statutory liability.⁸⁸

83. See NAT'L SMALL BUSINESS ASS'N, *supra* note 41.

84. See 15 U.S.C. § 1681o (2006).

85. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2216 (2007).

86. *Id.* at 2204.

87. In May 2007, the FTC released an FTC Business Alert in which it explained that merchants "may include no more than the last five digits of the card number, and . . . must delete the card's expiration date." FED. TRADE COMM'N, *supra* note 18. This alert, however, appears to be too little, too late. FACTA had been in force for at least six months by the time this alert (which, at just over one page, is awkwardly brief) was released. Furthermore, the force of this alert is less than clear. As the Supreme Court explained: "Before these [FCRA] cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC (which in any case has only enforcement responsibility, not substantive rulemaking authority, for the provisions in question)." *Burr*, 127 S. Ct. at 2216 (citations omitted). Furthermore, it is of some interest to note that in a June 15, 2004, release, the FTC, in explaining the protections provided by FACTA, noted that FACTA "will require that account numbers on credit card receipts be shortened or 'truncated' so that merchants, employees, or others who may have access to the receipts do not have access to consumers' names and full credit card numbers" but said nothing about the expiration date. Press Release, Fed. Trade Comm'n, Provisions of New Fair and Accurate Credit Transactions Act Will Help Reduce Identity Theft and Help Victims Recover (June 15, 2004), *available at* <http://www.ftc.gov/opa/2004/06/factaidt.shtm> (last visited Jan. 17, 2009).

88. While the Supreme Court has "recognized that a scienter requirement may mitigate a law's vagueness," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), FACTA does not require a showing of scienter but is, instead, a statute imposing strict liability. See *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 552 F. Supp. 2d 1302, 1306 (N.D. Ala. 2008).

The Clarification Act further supports the proposition that merchants reasonably understood FACTA's truncation requirements to permit the inclusion of the card's expiration date.⁸⁹ As noted earlier, the legislation amends the "[FCRA] to make technical corrections to the definition of willful noncompliance with respect to violations involving the printing of an expiration date on certain credit and debit card receipts before the date of the enactment of this Act."⁹⁰ As part of the new law, Congress found, "[m]any merchants understood that this [the truncation] requirement would be satisfied by truncating the account number down to the last 5 digits based in part on the language of the provision as well as the publicity in the aftermath of the passage of the law."⁹¹ Accordingly, "any person who printed an expiration date on any receipt" during the safe-harbor period "shall not be in willful noncompliance . . . by reason of printing such expiration date on the receipt."⁹² Moreover, "[e]xperts in the field agree that proper truncation of the card number, by itself as required by [FACTA], regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud."⁹³ Thus it seems unlikely that a reasonable business person would understand that removal of the credit card's expiration date was required for the prevention of identity theft.

Given the expert testimony, the new law (albeit flawed), and the clear and unambiguous voice of the business community, it seems fair to say that merchants reasonably believed they were allowed to include the expiration date on a consumer receipt.⁹⁴ All of this makes the near universal judicial pronouncement as to the clarity of the Statute all the more puzzling.⁹⁵ Where

89. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565.

90. *Id.*

91. *Id.*; see also NAT'L SMALL BUSINESS ASS'N, *supra* note 41 ("Unfortunately, [FACTA] was written in such a vague way that many businesses thought they were in compliance by printing only the last five digits of the card number and the expiration date."); Press Release, Nat'l Restaurant Ass'n, National Restaurant Association Hails FACTA "Fix" (Nov. 2, 2007), *available at* <http://www.restaurant.org/pressroom/print/index.cfm?ID=1517> ("FACTA has created an enormous amount of confusion among business owners") (last visited Jan. 17, 2009).

92. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 3(a), 122 Stat. 1565, 1566.

93. § 2(a)(6), 122 Stat. at 1565.

94. This point is further reinforced by President Bush's Fact Sheet when he signed FACTA into law. That Fact Sheet, while stating FACTA requires "merchants to leave all but the last five digits of a credit card number off store receipts," is silent as to the expiration date. Press Release, The White House, Fact Sheet: President Bush Signs the Fair and Accurate Credit Transactions Act of 2003 (Dec. 4, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031204-3.html> (last visited Jan. 15, 2009).

95. See, e.g., *Hedlund v. Hooters of Houston*, No. 08-CV-45, 2008 WL 2065852, at *4 (N.D. Tex. May 13, 2008); *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 760 (E.D. Pa. 2007); *Iosello v. Leiblys, Inc.*, 502 F. Supp. 2d 782, 786 (N.D. Ill. 2007); *Blanco v. El Pollo Loco, Inc.*, No. SACV

merchants reasonably, and in good faith, believe (albeit erroneously) a statute to have a particular meaning and application, action consistent therewith cannot amount to a willful violation of the law.⁹⁶ Indeed, the court in *Blanco v. El Pollo Loco, Inc.* recognized that a merchant's reasonable understanding of the statute's requirements could preclude a finding of willfulness, but refused to take action because the case was still in the early stages of litigation.⁹⁷ But that is exactly when the reasonableness determination needs to be made.⁹⁸

Because the costs of litigation can be substantial, defendants are under tremendous pressure to settle, "regardless of the cases' merits."⁹⁹ Courts deny approximately ninety percent of all motions to dismiss.¹⁰⁰ This pressure becomes particularly problematic for defendants facing potentially ruinous litigation.¹⁰¹ "Settlement is usually the most rational option, regardless of individual case facts."¹⁰² For courts to fail or refuse to take early action is tantamount to approving what has euphemistically been referred to as "strike suits,"¹⁰³ that is, suits brought to force settlement, regardless of merit, merely because the risk of loss is too great. The judicial branch should not countenance such legislative policies.

07-54 JVSРНBX, 2007 WL 1113997, at *2 (C.D. Cal. Apr. 3, 2007); *Aeschbacher v. Cal. Pizza Kitchen, Inc.*, No. CV 07-215 VBFJWX, 2007 WL 1500853, at *3 (C.D. Cal. Apr. 3, 2007).

96. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006) (ruling that a company will not be liable under 15 U.S.C. § 1681n for willfully or recklessly violating a consumer's rights if the "company . . . has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute").

97. *Blanco*, 2007 WL 1113997, at *2 ("How El Pollo Loco read the statute is, of course, relevant to whether it acted willfully. . . . Whether El Pollo Loco made a plausible interpretation of the law or acted diligently and in good faith, however, are not questions that can be answered at the pleading stage.") (denying a motion to dismiss).

98. A motion to dismiss is a device used to dispose of a case at the pleadings stage, before expensive, time-consuming discovery forces heavy costs on litigants. See *Burgess v. City & County of San Francisco*, No. 91-15084, 1992 WL 26545, at *2 (9th Cir. Feb. 18, 1992). While courts are typically limited to the information in the complaint for purposes of a motion to dismiss, the court may go outside the four corners of the document by converting the motion to dismiss to a motion for summary judgment. *Id.* ("A district court has discretion to convert a motion to dismiss under Rule 12(b)(6) to a motion for summary judgment.").

99. Schonbrun, *supra* note 14, at 52.

100. *Id.*

101. See *id.*

102. *Id.*

103. A strike suit is defined as a "suit (esp. a derivative action), often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." BLACK'S LAW DICTIONARY 1448 (8th ed. 2004).

2. FACTA's Damages Scheme

According to the law of nature it is only fair that no one should become richer through damages and injuries suffered by another.

Marcus Tullius Cicero¹⁰⁴

Equally problematic is FACTA's enforcement mechanism. FACTA's mandatory damage scheme,¹⁰⁵ divorced from any showing of actual harm, appears to serve as much to punish as it does to deter. That is, rather than protect from the possibility of real harm, it imposes liability regardless of harm. As such, due process concerns are at the fore and the protection of unwarranted deprivation must be guarded against. The Fifth Amendment prohibits the deprivation of "life, liberty, or property, without due process of law."¹⁰⁶ Justice Douglas, in striking down such an offense on due process grounds, opined: "[a]s Holmes wrote in *The Common Law*, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.'"¹⁰⁷

Addressing this issue head-on, Senior District Judge William M. Acker, Jr. recently explained:

The most obvious denial of "due process" that facially appears in [FACTA] comes from its vague description of the damages that must be awarded to a single victim against a single vendor for a single willful failure to truncate a customer's electronically produced credit card receipt, even though no actual damages are sustained. Under § 1681(n)(a)(1)(A), anyone who seeks actual damages must prove those damages and must prove that they were proximately caused by the vendor's willful noncompliance. . . . Without having sustained actual damages, credit-card using customers, whether or not they trolled for their non-compliant receipts, can sue their vendors if the vendor recklessly disregarded the FACTA obligation to truncate the credit card receipt (something relatively easy to prove) and can automatically recover "**damages of not less than \$100 and not more than \$1,000**" for each violation. If

104. NORBERT GUTERMAN, *THE ANCHOR BOOK OF LATIN QUOTATIONS: WITH ENGLISH TRANSLATIONS* 393 (1990).

105. 15 U.S.C. § 1681n (2006).

106. U.S. CONST. amend. V.

107. *Lambert v. California*, 355 U.S. 225, 229 (1957) (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 50 (1881)).

the same customer returns to the same establishment five times in five hours and uses his credit card each time, there will be five FACTA violations, each of which will trigger a strict liability recovery of **“not less than \$100 and not more than \$1,000[.]”** The possibility for a misuse of credit cards **by customers** reaches astronomical proportions more than the possibility of misuse of credit card information **by thieves**.¹⁰⁸

FACTA’s due process problem is not so much with the fact of a sliding scale, as the lack of any standards by which that scale may be fairly applied.¹⁰⁹ Here, defendants are at risk of losing substantial property rights—in some instances more than the net worth of the business. The loss of any such right must be fairly guarded. One way we protect those rights is by way of a jury trial.¹¹⁰ “Jury trials require understandable and rational criteria for any award of damages. If the statutory damages in FACTA were fixed at a stationary \$500 instead of an indeterminate amount, the preparation and delivery of a jury charge would be simple and constitutional. Congress, instead, here said “not less than \$100 and not more than \$1,000.”¹¹¹

How does a jury know whether to award \$100, \$200, \$300, or, for that matter, any amount between \$100 and \$1000? Adding to the complication is the fact that a jury may have to make that decision hundreds of times for each defendant, depending on the number of receipts issued (both in total and per customer). How can a jury fairly decide that defendant’s identical action justifies an award of \$100 to Plaintiff A, but should be \$200 to Plaintiff B? One thing is certain, it cannot be based on the defendant’s level of culpability; otherwise statutory damages become punitive damages and, as FACTA already allows for a separate award of punitive damages, there would be an unlawful double penalty.¹¹² If the award is not rationally tied to the violation,

108. *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 552 F. Supp. 2d 1302, 1305–06 (N.D. Ala. 2008).

109. *See id.* at 1306.

110. *Id.*

111. 15 U.S.C. § 1681n(a)(1)(A) (2006).

112. *See, e.g., Grimes*, 552 F. Supp. 2d at 1307. As the *Grimes* court put it:

If, as some plaintiffs argue, Congress meant in § 1681n(a)(1)(A) implicitly to allow a jury to slide between \$100 and \$1,000, depending upon what it finds to be the **degree** of a particular defendant’s willfulness, the word “willful” will receive a new meaning. Nothing in the FACTA language suggests any difference between how a jury is to react to **slight** willfulness and to **serious** willfulness. . . . If the degree of willfulness is a matter for jury consideration, a subsequent award of punitive damages is the remedy expressly provided for punishing egregious conduct. . . . Any adjustment upward from the FACTA

it is arbitrary and, therefore, constitutionally suspect.¹¹³ “[T]he statute here under consideration provides no guidance for deciding between \$100 and \$1,000, leaving it to the whim of the jury, that is, unless the court violates the doctrine of separation of powers and assumes the role of legislator as the only way to make sense of the present nonsensical language.”¹¹⁴

Granting various merchants’ motions for summary judgment, Judge Acker summarized FACTA’s constitutional hurdle, a hurdle he determined to be insuperable:

Courts and juries cannot be called upon to make up the rules as they go. Courts cannot be expected to tell a jury, “**Just do what you think is right**” (so long as you do not award less than \$100 or more than \$1,000). “Doing what is right” does not meet the standard of “due process”. Many a jury has done what it thought was right, and it was wrong. As an enforcer of the Seventh Amendment, this court must insist upon a jury’s having a chance at fairly performing its adjudicative function and not simply flying by the seat of its pants.

The words “**not less than \$100 and not more than \$1,000**” constitute an almost perfect illustration of the concept “void for vagueness”. There is no way short of legislation to remove the vagueness and ambiguity in these words. . . .

If a jury is allowed to wander indiscriminately between \$100 and \$1,000 for each willful FACTA violation, one jury can decide that a particular violation calls for \$100, while another jury can decide that precisely the same violation by the same vendor is worth \$1,000, while other juries can, willy nilly, award something in between.

minimum \$100 would necessarily be **punitive**, and therefore would trespass upon the punitive damages provision that immediately follows. ‘Due process’ does not tolerate a defendant’s being punished twice for the same conduct.

Id.; see also *In re Trans Union Corp.*, 211 F.R.D. 328, 341 (N.D. Ill. 2002) (citing as a “basic notion that a double penalty for the same act violates due process”). While the *Trans Union* court upheld the general statutory scheme in § 1681n(a)(1)(A), it did not address the more pressing question here; whether the statutory damages could be fairly applied (that is, whether there were fair standards or if the statutory penalty was based on the level of one’s culpability), ruling merely that statutory damages were in lieu of actual damages and, therefore, did not amount to a double penalty. See 211 F.R.D. at 341.

113. See *Grimes*, 552 F. Supp. 2d at 1307.

114. *Id.* at 1306.

Congress is, of course, presumed to know what it is doing, a presumption here in jeopardy. . . .

. . . .

If the classic words “void for vagueness” have meaning, they perfectly describe this statutory language. The language simply creates an unmanageable problem for courts who cannot be expected to be draftsmen and to judicially innovate solutions that would be an exercise of the legislative function.¹¹⁵

Judge Acker neatly penetrates to the heart of the problem. Either FACTA’s statutory damages are void due to a lack of standards by which a jury can fairly determine the appropriate amount of damage, or they violate constitutional norms as a double penalty because they require consideration of the defendant’s level of culpability (something more properly considered as part of any punitive damage award). Either way, the statutory scheme is constitutionally defective.

B. Whose Interpretation Controls?

A judge should interpret the law, not make it.

Senator Charles Schumer¹¹⁶

Courts have generally concluded that a properly truncated receipt means a receipt that includes no more than the last five digits of the consumer’s credit or debit card number *and* does not include any portion of the card’s expiration date.¹¹⁷ Merchants, on the other hand, while generally reaching the same conclusion as to the truncation of the credit and debit card numbers, concluded that the Statute permitted them to include the expiration date.¹¹⁸

For purposes of our discussion here, we will assume FACTA passes constitutional muster but may suffer from an interpretive defect such that it reasonably calls into question the willfulness of the alleged violation. The task then is to determine how best to understand the words of the Statute. “As Judge Learned Hand advised, statutes ‘should be construed, not as theorems

115. *Id.* at 1306–07.

116. Sen. Charles Schumer, *Remarks on Alito Nomination* (Oct. 31, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html> (last visited Jan. 17, 2009).

117. See cases cited *supra* note 52.

118. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(3), 122 Stat. 1565, 1565.

of Euclid, but with some imagination of the purposes which lie behind them.”¹¹⁹ For this reason, a “statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.”¹²⁰ As we have repeatedly observed, and as the language of the text makes clear, the context and central purpose of FACTA is the prevention of identity theft.¹²¹

With respect to 15 U.S.C. § 1681c(g)(1), the interpretive issue concerns whether the Statute permits or requires merchants to eliminate the credit or debit card’s expiration date from the issued receipt. On its face, the Statute provides that “no person . . . shall print more than the last 5 digits of the card number or the expiration date upon any receipt . . .”¹²² For the most part, the lower courts have concluded that the Statute is subject to only one reasonable interpretation; that is, merchants are required to remove the expiration date from their customer’s receipt. In doing so, however, the courts have not explained how this interpretation squares with either the canons of statutory construction, the purpose of the Statute, or the statutory context.

As to the canons, the trial courts ask us to believe that the words “last 5 digits” apply only to the card number but not the expiration date.¹²³ The problem with this construction is that it does not comport with the natural reading of the text. It is, by now, a widely recognized maxim that “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.”¹²⁴ While this rule is often referred to as the Doctrine of the Last Antecedent, its application is not limited to the words immediately preceding the phrase; instead, “[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.”¹²⁵ So then, the phrase “last 5 digits” should apply to the whole, that is, to both the card’s numbers as well as the card’s expiration date.

Furthermore, any decision regarding the removal of the expiration date should flow from a reasonable showing that such removal advances the

119. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 255 n.1 (1992) (Stevens, J., concurring) (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915)).

120. *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted).

121. *Ehrheart v. Verizon Wireless*, 547 F. Supp. 2d 463, 464 (W.D. Pa. 2007) (“Congress enacted FACTA . . . in part to assist victims of identity theft.”).

122. 15 U.S.C. §1681c(g)(1) (2006).

123. See cases cited *supra* note 52.

124. *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) (citing *United States v. Standard Brewery*, 251 U.S. 210 (1920)).

125. *Kasichke v. State*, 991 So. 2d 803, 812 (Fla. 2008) (quoting 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47.33 (7th ed. 2007)).

statutory scheme of protecting the consumer's identity. Here, however, there appears to be no positive correlation between the removal of the expiration date and identity theft. To the contrary, the evidence suggests that inclusion of the expiration date on an otherwise properly truncated receipt does not increase the risk of identity fraud.¹²⁶

So then, if including the expiration date on the receipt does not materially increase the risk of identity theft, how is one to think about the expiration language in the Statute? Here, defendants posit at least two viable readings of the Statute. First, "the statute could be read to 'allow a business to print the credit card's expiration date on the receipt so long as no more than the last 5 digits of the card appear.'"¹²⁷ Second, the Statute "could be read so that the phrase 'last 5 digits' modifies both 'card number' and 'expiration date,' and thus the business would be in compliance so long as it truncated the card number and printed only the last five digits of the expiration date."¹²⁸

Courts have criticized this first option as leading to the "absurd result that a firm could print an *entire card number* so long as it omitted the expiration date."¹²⁹ This is not necessarily so. It could as easily mean (and apparently a great many merchants took it to mean) that a merchant may print the expiration date on the receipt but must not print more than the last five (5) digits of the credit or debit card. This interpretation would have the salubrious effect of promoting consumer protection, merchant freedom, and would comport with both the language and intent of the Statute.

Courts have discounted the second option because the "majority of expiration dates are only four digits long, while others are six or at most eight digits, e.g., MM/YY, MM/YYYY, MM/DD/YY or MM/DD/YYYY" and, therefore, permitting a merchant to print the last five digits will not accomplish the statutory goal of preventing a "would-be identity thief" from discerning "the entire expiration date."¹³⁰ But this contention seems to miss the point. First, Congress may decide to permit date truncation, whatever the courts think of the policy. Second, as the inclusion of the expiration date does not increase the risk of identity theft when the receipt does not otherwise reveal more than the last five digits of the credit or debit card, any concern to the contrary is unfounded.

126. See cases cited *supra* note 51.

127. *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 970 (C.D. Cal. 2007) (citation omitted).

128. *Id.*; see also *Follman v. Hospitality Plus of Carpentersville, Inc.*, 532 F. Supp. 2d 960, 964 (N.D. Ill. 2007).

129. *Arcilla*, 488 F. Supp. 2d at 970; see also *Follman*, 532 F. Supp. 2d at 964 ("[The first reading] would permit a merchant to include the entire card number on the receipt, so long as the expiration was left off.").

130. *Follman*, 532 F. Supp. 2d at 964.

Moreover, even if the language could be read to preclude inclusion of the expiration date, courts are “limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.”¹³¹ To allow recovery for what is little more than a technical violation would be patently absurd. FACTA was designed as a tool in the battle against identity theft, not a tool for the personal enrichment of either counsel or litigant.

VI. GANG (I.E., CLASS ACTION) LAWSUITS MUST BE STOPPED

Litigation, n. A machine which you go into as a pig and come out of as a sausage.

Ambrose Bierce¹³²

Many pending FACTA lawsuits have been filed as class actions. The class action lawsuit is a popular litigation tool.¹³³ It allows plaintiffs (known and unknown) to band together as a single entity to bring their claims against one or more defendants.¹³⁴ In order to proceed as a class, plaintiffs must demonstrate: (1) “the class is so numerous that joinder of all members is impracticable”; (2) “there are questions of law or fact common to the class”; (3) “the claims or defenses of the representative parties are typical of the claims or defenses of the class”; (4) “the representative parties will fairly and adequately protect the interests of the class”; (5) “questions of law or fact common to class members predominate over any questions affecting only individual members”; and (6) “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹³⁵ For purposes of the recent FACTA actions, many of the courts have focused on whether the class action device is the superior means of resolving the instant dispute.¹³⁶

131. *United States v. Kirby*, 74 U.S. 482, 486–87 (1868).

132. Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 283 (1996) (quoting AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 194 (1911)).

133. *See* Schonbrun, *supra* note 14, at 50.

134. *See id.*

135. FED. R. CIV. P. 23(a), (b)(3).

136. *See, e.g.,* *Blanco v. CEC Entm’t Concepts*, No. CV 07-0559 GPS, 2008 WL 239658, at *1 (C.D. Cal. Jan. 10, 2008).

In determining superiority, the courts have attempted to balance the policy favoring court access against the potential for debilitating harm.¹³⁷ To that end, the results have been mixed. While there seems to be general consensus that debilitating damages should be avoided, the question becomes one of procedure or timing. Many of the district courts within the Ninth Circuit have concluded that the size of the potential award is a factor in determining the superiority of the action,¹³⁸ whereas district courts within the Seventh Circuit have been more inclined to assess the due process concerns of large damage awards only after final liability has been determined.¹³⁹ Again, this wait-and-see attitude has substantial potential consequences, chief of which is the concern with wringing an unfair settlement from a merchant justifiably concerned with unknown liability and the uncertainty of the litigation process. There is simply no good reason not to settle this matter at the earliest stage possible. Certainly, by the time a court hears a motion for class certification, it has enough information to assess the constitutional issues.

A. *David Versus Goliath*

In a world filled with Davids, no one roots for Goliath.

Wilt Chamberlain¹⁴⁰

At the heart of the class action device is a policy favoring the aggregation of small claims.¹⁴¹ “By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.”¹⁴² “Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”¹⁴³

“Accordingly, class treatment of claims is most appropriate where it is not ‘economically feasible’ for individuals to pursue their own claims.”¹⁴⁴ On the other hand, where, as in the case of FACTA, a statutory scheme provides “for

137. *See id.*; *see also In re H & R Block Mortgage Corp.*, 244 F.R.D. 490, 495 (N.D. Ind. 2007).

138. *E.g., Blanco*, 2008 WL 239658, at *2.

139. *E.g., In re H & R Block Mortgage Corp.*, 244 F.R.D. at 495.

140. David J. Johns, *Wilt Chamberlain*, in *AFRICAN AMERICAN ICONS OF SPORT: TRIUMPH, COURAGE, AND EXCELLENCE* 61, 63 (Matthew C. Whitaker ed., 2008).

141. *See Schonbrun, supra* note 14, at 50.

142. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968).

143. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980).

144. *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002).

the award of attorney's fees and costs to successful plaintiffs [it] eliminates any potential financial bar to pursuing individual claims."¹⁴⁵ Here, because the law provides for sizeable statutory damages, compensates for the cost of counsel, and offers the possibility of substantial punitive damage awards, moving forward as a class action is unnecessary.

In addition, the class device loses much of its appeal when, instead of compensating a litigant for harm suffered, it is used as a club to wring settlements from defendants—settlements, the bulk of which are minimally distributed to the actual litigant but from which the attorneys are richly rewarded.¹⁴⁶ For example:

In 1993, class action attorneys sued General Chemical Corporation over an accidental release of sulfuric acid from its facility in Richmond, California. At its highest level of concentration, the amount of sulfuric acid released in the onetime event was a small fraction of the daily exposure limit allowed by California safety laws. Plaintiffs' lawyers hired "representatives" to scour the neighborhood. They successfully signed sixty thousand clients. Thirty thousand residents flooded local hospitals but treating doctors claimed that very few had any significant injury. It was reported that neighbors in adjacent communities came to the area in order to become clients in the litigation. The chemical firm's insurance company settled the case for \$180 million, \$50 million of which went to the lawyers. The average payment to class members was under \$1,000.¹⁴⁷

145. *Id.* at 449 (citing 15 U.S.C. § 1691e(d) (2006)) (vacating class certification order due, in part, to the "[Equal Credit Opportunity Act's] provision for the award of attorney's fees and costs to successful plaintiffs"); *see also* *Forman v. Data Transfer*, 164 F.R.D. 400, 404 (E.D. Pa. 1995). The *Forman* court denied class certification to plaintiffs suing under the Telephone Consumer Protection Act, in part because:

The statute provides for a *minimum* recovery of \$500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation. This most likely exceeds any actual monetary loss . . . suffered by most plaintiffs in such a case. The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on his own behalf.

Id.; *Wilson v. Am. Cablevision of Kansas City*, 133 F.R.D. 573, 579 (W.D. Mo. 1990) ("The Cable Act provides every individual subscriber to cable television with an appropriate remedy by way of individual actions for violations of the requirement of that Act, including but not limited to the recovery of damages, attorney's fees and court costs.").

146. Schonbrun, *supra* note 14, at 53.

147. *Id.* at 52.

This case exemplifies the problems merchants face when courts refuse to look at the underlying realities of the case. Where, as in the FACTA actions, the plaintiffs have not been harmed, individual lawsuits provide an adequate remedy, and the potential liability for a technical statutory violation is large, the courts must take action to stem the tide by refusing to certify these classes.

B. You Want Me to Pay HOW MUCH?!

Please, sir . . . I want some more.

Oliver Twist¹⁴⁸

When actual damages are relatively low and potential liability is high, courts should be, and frequently are, less inclined to certify a class action.¹⁴⁹ In what may be considered the seminal analysis on this issue, Judge Frankel in *Ratner v. Chemical Bank New York Trust Co.*¹⁵⁰ observed, “the allowance of thousands of minimum recoveries like plaintiff’s would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.” Moving on to a more detailed discussion of statutory remedies, Judge Frankel opined:

148. CHARLES DICKENS, *OLIVER TWIST* 11 (Kathleen Tillotson ed., 1966).

149. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003). The Eleventh Circuit reversed a grant of class certification for plaintiffs suing under the Truth In Lending Act, in part because:

Under such circumstances, even though economic harm is not an element of the Florida common law claim for restitution, it may be required for superiority under the Federal Rules of Civil Procedure. This is especially likely when, as in the present suit, the defendants’ potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff.

Id.; *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234–35 (9th Cir. 1974) (observing the lack of superiority when damages “shock the conscience”); *Legge v. Nextel Commc’ns, Inc.*, No. 02-8676DSF, 2004 WL 5235587, at *13 (C.D. Cal. June 25, 2004) (“Nextel argues that the class action procedure should not be used as a mechanism to impose ‘super penalties.’ The Court finds this argument persuasive. Allowing this case to proceed as a class action has potentially ruinous results—without concomitant benefit to the class.”); *In re Trans Union Corp.*, 211 F.R.D. 328, 351 (N.D. Ill. 2001) (finding that FCRA class action lacked superiority in part because statutory damages would be “grossly disproportionate to any actual damage” suffered); *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602, 608 (N.D. Ill. 1973). The *Berkman* court stated that:

It is well settled that the class action device is inappropriate in Truth in Lending cases where, as in the instant action, the size of the potential class, coupled with the statutory minimum recovery of \$100 would result in absurdly high or ruinous damages, wholly unrelated to the actual harm caused by the violations.

Id. But see *Braxton v. Farmer’s Ins. Group*, 209 F.R.D. 654, 662 (N.D. Ala. 2002) (holding that a large potential damage award is not a basis for denying class certification where the FCRA requires a showing of willfulness).

150. 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

Students of the Rule have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature. Appealing to that kind of judgment, defendant points out that (1) the incentive of class-action benefits is unnecessary in view of the Act's provisions for a \$100 minimum recovery and payment of costs and a reasonable fee for counsel; and (2) the proposed recovery of \$100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act. These points are cogent and persuasive. . . . It is not fairly possible in the circumstances of this case to find the . . . class action 'superior to' this specifically 'available [method] for the fair and efficient adjudication of the controversy.'¹⁵¹

Following *Ratner*, courts routinely refused to certify class actions based on alleged violations of the Truth in Lending Act ("TILA").¹⁵² "Recognizing the problems, Congress amended TILA in 1974, eliminating the minimum statutory recovery and placing a limit of the lesser of \$100,000 or 1 percent of the net worth of the creditor, on the total recovery in class actions."¹⁵³ As with the pre-amended version of TILA, the FCRA and, hence, FACTA, places no cap on total damages.¹⁵⁴ Even among the more hesitant courts, this argument has had a sobering effect. Denying certification in *In re Trans Union Corp.*, District Judge Gettleman concluded:

Although certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact.¹⁵⁵

The dangers of class certification are simply too great. Certifying a class where potential damages are a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to the

151. *Id.* at 416.

152. *See, e.g., In re Trans Union Corp.*, 211 F.R.D. at 348.

153. *Id.* (citing Pub. L. No. 93-495, § 408(a), 88 Stat. 518 (1974)).

154. *See* 15 U.S.C. §§ 1681n-1681o (2006).

155. *In re Trans Union Corp.*, 211 F.R.D. at 351.

defendant”¹⁵⁶ for what is, at most, merely a “technical violation of FACTA”¹⁵⁷ is contrary to constitutional norms. Indeed, as Judge Gary L. Lancaster recently observed:

Although FACTA is a relatively recent statute, the veritable onslaught of class action litigation brought pursuant to the statute has given rise to a line of cases in the United States District Court for the Central District of California holding that FACTA class actions do not satisfy the superiority prong of Rule 23(b)(3) because they would expose the defendant to ruinous damages in violation of the due process clause of the Fifth Amendment to the United States Constitution.¹⁵⁸

Unfortunately some businesses, fearing the uncertainty of the litigation process, have opted to settle rather than risk an unknown and potentially catastrophic judgment.¹⁵⁹ While numerous courts have denied class certification due to the real possibility of ruinous damages, other courts have refused to address the damages issue until after a class has been certified,¹⁶⁰ thus increasing the possibility of what has been fairly termed a “blackmail settlement,”¹⁶¹ that is, “settlements induced by a small probability of an immense judgment in a class action.”¹⁶² As Judge Jerry E. Smith explained, “The risk of facing an all-or-nothing verdict presents too high a risk, even

156. *Ratner*, 54 F.R.D. at 416.

157. *Blanco v. CEC Entm’t Concepts L.P.*, No. CV 07-0559 GPS, 2008 WL 239658, at *1 (C.D. Cal. Jan. 10, 2008); *see also Serna v. Costco Wholesale Corp.*, No. CV 07-149 AHM, 2008 WL 234197, at *1 (S.D. Cal. Jan. 3, 2008) (“Defendant’s alleged violations . . . really are merely technical.”); *Klingensmith v. Max & Erma’s Rests., Inc.*, No. CV 07-0318, 2007 WL 3118505, at *4 (E.D. Pa. Oct. 23, 2007) (“damages for technical violation (*i.e.*, absent allegations of actual injury) are statutorily mandated”); *In re H & R Block Mortgage Corp.*, 244 F.R.D. 490, 496 (N.D. Ind. 2007) (“[A] FACTA violation is a mere technical violation.”); *Soualian v. Int’l Coffee & Tea L.L.C.*, No. CV 07-502 RGK, 2007 WL 4877902, at *3 (C.D. Cal. Jan. 3, 2007) (“[H]aving the expiration date on credit card and debit card receipts was a technical violation of FACTA.”).

158. *Palamara v. Kings Family Rests.*, No. CV 07-317, 2008 WL 1818453, at *3 (W.D. Pa. Apr. 22, 2008); *see also Blanco*, 2008 WL 239658, at *2 (denying class certification, ruling: “the potential damages at issue are grossly disproportionate to the alleged injury (*i.e.*, potential threat of identity theft rather than actual harm)”; *Dister v. Apple-Bay E., Inc.*, No. C 07-01377 SBA, 2008 WL 62280, at *2 (N.D. Cal. Jan. 4, 2008) (“As in *Soualian*, the present case involves no allegations of actual harm to individual plaintiffs, but does involve potentially large penalties ‘in excess of \$217 million based solely on an alleged technical violation that resulted in no harm to Plaintiff or anyone else.’”). *But see Kesler v. Ikea U.S. Inc.*, No. SACV 07-568 JVS, 2008 WL 413268, at *8 (C.D. Cal. Feb. 4, 2008) (“[C]oncerns about the constitutionality of any damage award are better addressed at the damages phase of the litigation and not as part of class certification.”).

159. *See, e.g., Palamara*, 2008 WL 1818453; *Klingensmith*, 2007 WL 3118505.

160. *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006).

161. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

162. *Id.*

when the probability of an adverse judgment is low.”¹⁶³ And as the Supreme Court warned, “Certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.”¹⁶⁴

Fortunately, nothing requires courts to wait until after certification to address due process concerns stemming from potentially crushing liability. As Judge Otis Wright explained, “The Court believes putting a company out of business for failing to excise the expiration dates from credit card receipts—especially without proof of actual harm, is the type of undesirable result that the Advisory Committee and the Ninth Circuit warned against.”¹⁶⁵ There is simply nothing in the requirements of the class action device that prevents courts from considering potential harm to the defendant. To the contrary, fundamental rules of fairness should motivate courts to do just that.

C. There Has to Be a Better Way

Litigation is the pursuit of practical ends, not a game of chess.

Felix Frankfurter¹⁶⁶

So if class action treatment is inappropriate, what are plaintiffs’ options? The *Blanco* court suggests three alternatives: first, “FACTA provides for the recovery of attorneys fees and punitive damages[,] [giving] individuals an incentive to [bring individual lawsuits as] an alternative to bringing a class action”; second, “the Advisory Notes to Rule 23 state that there may be ‘greater practical advantages’ to other methods such as consolidating cases”; and third, “there are other federal enforcement alternatives, such as through the Federal Trade Commission.”¹⁶⁷ Indeed, given the number of reasonable alternatives, the lack of any real harm, and the potential for crushing liability for what is, at most, a mere technical violation, there is no good reason to permit class treatment.

VII. CONCLUSION

Reasoning draws a conclusion . . . but does not make the
conclusion certain . . . unless the mind discovers it by the path
of experience.

163. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

164. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

165. *Azoiani v. Love’s Travel Stops & Country Stores Inc.*, No. RDCV 07-90 ODW, 2007 WL 4811627, at * 5 (C.D. Cal. Dec. 18, 2007).

166. *City of Indianapolis v. Chase Nat’l Bank of N.Y.*, 314 U.S. 63, 69 (1941).

167. *Blanco v. CEC Entm’t Concepts L.P.*, No. CV 07-0559 GPS, 2008 WL 239658, at *1 (C.D. Cal. Jan. 10, 2008).

Roger Bacon¹⁶⁸

The main problem with FACTA has not necessarily been with the law but with the way in which the courts have applied the law. With few exceptions, the trial courts have declared a rather fuzzy law to be clear. They have found within its words meaning to which they alone are privy, that is, that the Statute clearly forbids the printing of a card's expiration date. In doing so, the courts have failed to consider reasonable alternative readings as well as the problems associated with potentially crushing damages—damages based on a vague statutory scheme, which, in all likelihood, violate defendants' due process rights. While the Clarification Act may provide temporary relief for certain plaintiffs involved in the current spate of lawsuits, the new law creates as many problems as it solves. Most significantly, the law fails to address the two most pressing problems. First, the law fails to address whether printing a card's expiration date constitutes a violation of FACTA (here, the Clarification Act offers a band-aid answer: "maybe"). Second, the law fails to correct the due process concerns raised by the Statute's compensatory scheme, i.e., the failure to include a cap on total damages and the failure to offer any guidelines for determining the range of permissible statutory damages.

So, how do we fix these problems? While comprehensive legislation is the most desirable solution, it seems unlikely, especially given the compromises made to pass the Clarification Act. Most of the work, therefore, needs to be done at the courthouse. Until the judiciary is willing to look behind the surface appeal of these mass produced lawsuits, the outlook for merchants is less than rosy. The future is not, however, bleak. To the extent more judges can be persuaded to follow the common sense approach of Senior District Judge William M. Acker in the *Grimes* case, the more likely we are to find reasonable solutions. To that end, this Article has presented some of the more pressing arguments swirling around FACTA and presented alternate points of view, in the hope of sparking further dialogue to facilitate a reasonable resolution of these thorny issues.

168. 3 THE WORLD OF MATHEMATICS 1758 (James Newman ed., 2000).